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No. 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

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QUESTIONS PRESENTED

Whether the Interstate Commerce Commission, when approving a transaction pursuant to 49 U.S.C. §§ 11343 and 11344 (1982), is required to make specific findings of necessity pursuant to 49 U.S.C. § 11341(a)(1982) in order to exempt carriers participating in the approved transaction from the requirements of the Railway Labor Act, 45 U.S.C. §§ 151-160 (1982)?

LIST OF PARTIES

Brotherhood of Locomotive Engineers and United Transportation Union were petitioners in the ase below in the District of Columbia Circuit Court of Appeals.

Interstate Commerce Commission and United States of America were respondents.

Missouri-Kansas-Texas Railroad Company, Denver & Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, and Union Pacific Railroad Company were intervenors in support of the Interstate Commerce Commission.

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I.

OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 761 F.2d 714 (D.C. Cir. 1985). It appears in the Appendix to Petitioner's Petition For Writ of Certiorari at A1.[1] The May 12, 1983 and October 19, 1983 orders of the Interstate Commerce Commission appear in the Petitioner's Appendix at A36 and A40.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1985, and amended on July 12, 1985. On August 9, 1985, the Court of Appeals entered orders denying the petition for rehearing and the suggestions for rehearing *en banc*. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III.

STATUTES INVOLVED

The statutes involved in this proceeding are the Interstate Commerce Act, 49 U.S.C. §§ 11341(a), 11343, 11344 and 11347 (1982), and the Railway Labor Act, 45 U.S.C. §§ 151-160 (1982). The pertinent provisions of these statutes are set forth in the Petitioner's Appendix at A55-A65.

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[1] On April 21, 1986, the Court granted the motion of petitioners to dispense with printing the joint appendix. References herein to the Appendix to the petitioner's petition for writ of certiorari will be designated by "App." References to the Joint Appendix to the briefs submitted to the Court of Appeals in the case below will be designated by "J.App."

IV.

STATEMENT OF THE CASE

This case presents the question of the circumstances under which the Interstate Commerce Commission ("ICC" or "Commission") may utilize its powers under 49 U.S.C. § 11341(a) (1982) to exempt carriers participating in transactions approved under 49 U.S.C. §§ 11343 and 11344 (1982) from the requirements of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-160 (1982).

A. Facts Giving Rise To The Controversy

On September 15, 1980, Union Pacific Corporation filed applications with the ICC pursuant to 49 U.S.C. §§ 11343 and 11344 (1982) seeking to acquire control over Missouri Pacific Corporation ("MP") and its carrier subsidiaries, and over Western Pacific Railroad Company ("WP"). The proposed consolidation of the Union Pacific ("UP"), Missouri Pacific, and Western Pacific railroads would result in one of the largest railroad systems in the country, covering over 22,000 miles of trackage, and creating single system rail service between the Pacific Northwest, northern and southern California, the Midwest, Mississippi River ports, Gulf Coast ports, and Texas-Mexico border points. *Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific Railroad—Control—Missouri Pacific Corp. and Missouri Pacific Railroad*, 366 I.C.C. 459, 471-74 (1982), *aff'd in pertinent part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S.Ct. 1172 (1985).

A number of carriers, including the petitioner, Missouri-Kansas-Texas Railroad Company ("MKT"), opposed the consolidation because of the serious anticompetitive effects of the acquisition. MKT operated over 2100 miles of track in Kansas, Missouri, Oklahoma and Texas, and its major lines extended from St. Louis and Kansas City to San Antonio, Houston and Galveston. At the time of the pro-

posed acquisition, MKT interchanged approximately one-fifth of its traffic with UP (at Kansas City) and MP (principally at Dallas-Ft. Worth). MKT estimated that it would suffer traffic diversions of approximately $23.5 million if the UP-MP-WP acquisition were approved, and contended that these diversions would jeopardize its ability to provide essential rail service to the shipping public. *Id.* at 479.

MKT was largely concerned about the potential loss of interchange traffic that originated at Omaha and other grain gathering points and that it received from UP at Kansas City. MP also interchanged traffic with UP at Kansas City. Despite the fact that MKT had less than one-half as many route miles in Texas as MP, MKT was UP's largest connecting carrier at Kansas City for Texas traffic and received over twice as much traffic from UP as MP did. If the UP-MP-WP acquisition were approved, MKT feared that UP would divert most of this Kansas City interchange traffic to MP. *Id.* at 530. In addition, MKT argued that the elimination of parallel competition between UP and MP, the second and third largest carriers in the Kansas City-Omaha corridor, would be inconsistent with the public interest. *Id.* at 698-99.

As part of its opposition case, and in an effort to minimize the anticompetitive effects of the UP-MP-WP consolidation, MKT filed applications seeking trackage rights over certain MP and UP lines, including the line between Kansas City and Omaha. MKT included in the trackage rights application a proposed trackage rights agreement that provided that "MKT, with its own employees, and at its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." MKT Trackage Rights Application, Exhibit 2, Section 5, I.C.C. F.D. No. 30,000 (Sub-No. 25) (filed Jan. 13, 1981). It furnished a labor impact statement predicated on the use of its own employees, and projected that "[b]ecause of the limited impact of its trackage rights arrangement and the increase in traffic volume which would accrue to MP as a result

of the proposed UP-MP control transaction, these trackage rights should have no adverse impact upon MP or UP employees." *Id.* at 4.

The ICC held hearings on MKT's trackage rights application. UP and MP vigorously opposed the trackage rights proposal. In addition, the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") submitted evidence protesting MKT's trackage rights application. No party, however, challenged either MKT's right to use its own employees in its proposed trackage rights operations or the Commission's authority to approve MKT's proposed trackage rights agreement providing for operations by MKT crews.

On October 20, 1982, the ICC served its decision in the UP-MP-WP merger case. In that order, the Commission observed that its review of the proposed consolidation was governed by 49 U.S.C. § 11344, and noted that it was required to approve the transaction if it found the transaction to be "consistent with the public interest." 366 I.C.C. at 483. The Commission focused on the anticompetitive aspects of the proposed acquisition. It also considered, *inter alia*, the interest of carrier employees affected by the proposed transaction in making its "public interest" determination. *See* 49 U.S.C. § 11344(b)(1)(D) (1982). In addition, under 49 U.S.C. § 11347 (1982), the Commission was required to provide protective conditions for employees affected by the transaction, and it considered various arguments concerning those conditions. 366 I.C.C. at 618-19.

In its decision, the ICC held that unconditional approval of the UP-MP-WP consolidation would not be in the public interest because, *inter alia*, MKT would suffer an impairment of its ability to provide essential rail service on shipments moving from Omaha and other grain gathering points in the Midwest via Kansas City to Gulf Coast points. *Id.* at 530-31, 547. The Commission found:

> [t]he MP and MKT are each effective and efficient routes south of Kansas City.
>
> After the consolidation UP will have an incentive to favor the MP line in order to maximize its profit from movements south of Kansas City. Because MKT handles the largest amount of UP traffic moving to Texas via Kansas City it will be the competitor south of Kansas City most directly affected by the shift of UP traffic to the MP. . . .
>
> * * * *
>
> In combination with the elimination of UP-MP parallel competition between Kansas City and Omaha/Council Bluffs this vertical foreclosure of MKT at Kansas City represents a substantial lessening of competition for traffic, especially grain, moving from the area between Omaha/Council Bluffs and Kansas City to the Gulf.

Id. at 530-31. The ICC concluded that those anticompetitive consequences could be "ameliorated," *id.* at 531, and in some respects "fully off-set," *id.* at 547, by conditioning its approval of the transaction on the grant of certain of MKT's trackage rights requests, *id.* at 548.

In defining the nature of these conditions, the Commission specifically addressed the crew manning issue in analyzing MKT's trackage rights application. The ICC commented on MP's challenge to MKT's estimate of the number of MKT employees required to provide the proposed service. 366 I.C.C. at 566-72. It agreed that MKT most likely had underestimated its crew requirements, but still found that MKT's proposed operation would be entirely feasible with an increased MKT crew complement. *Id.* at 569.

The Commission also carefully examined the interests of the carrier employees affected by MKT's trackage rights

proposal. It found that the transactions were consistent with the public interest and imposed the labor protective conditions that it had specified in *Norfolk & Western Railway—Trackage Rights—Burlington Northern*, as modified by *Mendocino Coast Railway—Lease and Operate—California Western Railroad*, for the benefit of those employees.[2] 366 I.C.C. at 621. These conditions provide generous compensatory benefits ensuring, *inter alia*, that any employee dismissed or displaced as a result of the transaction will continue to receive the equivalent of up to six years of prior wages. In addition, the conditions provide for compulsory arbitration of disputes arising under the conditions, including disputes concerning the implementation of the authorized transaction.[3]

UTU (and a number of other labor unions) appealed the Commission's decision approving the UP-MP-WP consoli-

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[2] *See Mendocino Coast Ry.—Lease and Operate—California W. R.R.*, 360 I.C.C. 653, 644 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982); *Norfolk & W. Ry.—Trackage Rights—Burlington N.*, 354 I.C.C. 605 (1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California W. R.R.*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

[3] The ICC imposed the *New York Dock* conditions for the benefit of employees affected by the primary transaction, 366 I.C.C. at 618-21. *See New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). The major differences between the *New York Dock* conditions and the *Mendocino* conditions are twofold. First, under article I, section 4 of the *New York Dock* conditions, carriers must give employees *90* days written notice of changes in operations, services, or equipment as a result of a transaction that may cause dismissal or displacement of employees or rearrangement of forces; under article I, section 4 of the *Mendocino* conditions, only *20* days notice is required. Second, under the *New York Dock* conditions, the carrier may not institute operational changes until an implementing agreement has been reached with the unions, either through negotiations or arbitration; under article I, section 4 of the *Mendocino* conditions, carriers may proceed with the proposed operational changes *even if* an implementing agreement has not been reached.

dation, arguing that the level of employee protection imposed on the primary transaction was insufficient to satisfy the provisions of 49 U.S.C. §§ 11344(b)(1)(D) and 11347. BLE did not appeal the ICC's October 20, 1982 decision. Neither UTU nor any other union claimed on appeal that approval of MKT's trackage rights application allowing MKT to use its own crews violated the Railway Labor Act (or any other statute). The United States Court of Appeals for the District of Columbia Circuit rejected the unions' arguments assailing the level of employee protection imposed by the ICC and affirmed this aspect of the Commission's decision. *Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708, 725 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S.Ct. 1172 (1985).

Both prior to and subsequent to the Commission's October 20, 1982 order, MKT held discussions with BLE and UTU representatives as the organizations representing MKT's operating employees, concerning the necessity to commence the trackage rights operations as soon as possible after approval was granted. In November, 1982, MKT exchanged proposals with these BLE and UTU representatives concerning the manning of the trackage rights operations. J.App. at 130, 134-36. MKT negotiated amendments to its collective bargaining agreements with BLE on January 5, 1983 to govern the trackage rights operation. J.App. at 142. On January 6, 1983, MKT commenced operations as a trackage rights tenant over the involved MP and UP lines using its own crews. J.App. at 27. On March 10, 1983, MKT and MP filed a formal trackage rights agreement with the ICC that provided that MKT would use its own crews and equipment in the trackage rights operation, as authorized by the Commission. J.App. at x, No. 15. MKT reached formal agreements with UTU concerning the implementation of the trackage rights operation on April 11 and April 13, 1983. J.App. at 130. Those agreements fulfilled MKT's obligations under article I, section 4 of the *Mendocino* conditions to negotiate with

the collective bargaining representatives of its employees affected by the rearrangement of MKT forces required to operate the trackage rights.[4]

After MKT commenced its trackage rights operations, UTU, on behalf of *MP* employees,[5] demanded of MP that

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[4] Article I, section 4 of the *Mendocino* conditions provides in pertinent part:

> When the railroads contemplate a transaction, they shall give at least twenty (20) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroads and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes.
>
> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

If at the end of the twenty-day period there is a failure to agree, the negotiations shall terminate and either party to the dispute may submit it to arbitration. *Norfolk & W. Ry.—Trackage Rights—Burlington N.*, 354 I.C.C. 605, 610-11 app. (1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California W. R.R.*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

[5] The UTU is the statutory bargaining representative of both MKT and MP employees. Having made an agreement with MKT governing the proposed operation in its capacity as representative of MKT's employees, its subsequent effort to attack collaterally that agreement in the course of representing MP employees raises, at the least, trouble-

MKT use MP crews to conduct MKT's trackage rights operations. J.App. at 122-23. MP did not accede to this demand because the ICC specifically had authorized MKT to use its own crews. As stated in UTU's brief to the Court below, "petitioner UTU responded to MoPac's refusal to negotiate by declaring a strike of MoPac for April 4, 1983." Brief for Petitioner at 13. On March 30, 1983, MP filed a complaint in the United States District Court for the Eastern District of Missouri seeking declaratory and injunctive relief against the strike. On that same date, the District Court entered a temporary restraining order prohibiting, *inter alia*, implementation of UTU's strike threat. The District Court preliminarily enjoined the strike on February 7, 1984, and issued a permanent injunction soon thereafter. *Missouri Pacific Railroad v. UTU*, 580 F. Supp. 1490, 1507 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107, 110 (8th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 18, 1985) (No. 85-1054).

On April 4, 1983, shortly after the District Court issued a temporary restraining order prohibiting UTU's threatened strike, BLE filed with the ICC a "Petition For Clarification" of the Commission's October 20, 1982 order, as to which the time for seeking judicial review had expired months earlier. BLE cited "[r]ecent communications" from MP to the effect that MKT and DRGW were relying on the Commission's order in Sub-No. 25 (and Sub-No. 18) as authority for the use of their own crews in performing the trackage rights operations in question. BLE argued that the Commission's October, 1982 order did not address the crew issue. J.App. at 2.

The Commission denied BLE's petition in an order served on May 18, 1983. App. at A36-A39. In that decision, the Commission concluded:

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some questions concerning its duty to "make and maintain" agreements under section 2, First of the Railway Labor Act. 45 U.S.C. § 152, First (1982). That issue is, however, extraneous to the question presented here.

> The consolidation decision does not require clarification. We approved the responsive trackage rights applications of DRGW and MKT in Sub-No. 18 and Sub-No. 25 subject only to applicable employee protective conditions and the requirement that the parties negotiate compensation for use of the MP lines (or request us to set compensation in the event of an impasse). Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations . . . .
>
> BLE has presented no arguments or evidence setting forth any issue in need of clarification. Rather, BLE is attempting to reargue an issue that has already been decided.

App. at A38.

Thereafter, on May 31, 1983, BLE filed with the ICC a "Petition For Reconsideration" of the May 18 order. BLE contended that the Commission exceeded its jurisdiction in its October 20, 1982 order when it authorized MKT to use its own crews. BLE's conclusion and prayer for relief provided:

> In sum, the Brotherhood of Locomotive Engineers submits that the Commission does not have jurisdiction over these labor disputes since such matters are within the purview of the Railway Labor Act, and respectfully requests that the Commission grant this petition for reconsideration and issue an order holding that crew assignments and manning of positions are matters not within the jurisdiction of the Commission but are labor disputes to be resolved under the procedures of the Railway Labor Act.

J.App. at 54.

On June 7, 1983, UTU also petitioned the ICC for reconsideration of its May 18, 1983 order. UTU allegedly had presumed that the *Mendocino* conditions[6] would provide *MP* employees with an opportunity to participate in *MKT's* decision to assign crews for the trackage rights operation. *See* UTU Reply to MKT Motion to Dismiss at 14. UTU argued:

> This Commission does not have the authority under 49 U.S.C. § 11341 to grant an exemption from the unilateral change prescriptions of the Railway Labor Act, and even if it did, it has not done so in this case.

J.App. at 77.

The Commission entered an order on October 25, 1983, denying BLE's and UTU's petitions for reconsideration. App. at A40-A50. In that decision, the Commission focused on BLE's and UTU's principal argument that the proposed trackage rights operations allowing tenants to use their own crews unilaterally changed the working conditions of MP employees, and that the Commission had no jurisdiction to determine such labor disputes. App. at A42-A43. It then explained in great detail why the unions' arguments were incorrect.

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[6] This argument was a specious *post hoc* rationalization for UTU's failure to object in a timely manner to the crewing provisions of MKT's trackage rights proposal. As demonstrated above, MKT had complied fully with article I, section 4 of *Mendocino* when it negotiated agreements with UTU (and BLE) governing the rearrangement of MKT employees caused by the approval of the trackage rights application. *See supra* p. 8. To the extent that MP employees can establish that they have been adversely affected with respect to compensation, they may have the right to compensatory payments from MP under other sections of the *Mendocino* conditions. They have no right under article I, section 4 to arbitrate the identity of the crews to perform the trackage rights operations because the Commission already decided that issue.

The Commission properly found that the trackage rights agreements did not result in any change in MP employees' working conditions, and rejected the argument that the trackage rights constituted a transfer or contracting out of work previously performed by MP employees.[7] App. at A48. It reiterated that it had approved the MKT and DRGW trackage rights applications "to ameliorate certain anticompetitive impacts of the UP-MP consolidation," and it emphasized that the trackage rights operations would be conducted in competition with UP-MP operations, because "MKT and Rio Grande will be handling traffic for their own accounts not for UP-MP." App. at A48-A49. Under these circumstances, the Commission found that "UP-MP has not transferred or contracted out any work by agreeing to the trackage rights as a condition to the consolidation." App. at A48-A49.

The Commission reaffirmed that "crew assignment provisions in trackage rights agreements are within this Commission's subject matter jurisdiction to the extent they relate to the transportation effects of the proposed transaction," App. at A49, and held that trackage rights agreements found to be consistent with the public interest under 49 U.S.C. § 11344 could be implemented without any further approval in light of the Commission's exemption authority under 49 U.S.C. § 11341(a) (1982). App. at A50. According to the Commission, this exemption authority applies to the Railway Labor Act *status quo* provision barring unilateral changes by carriers in working conditions

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[7] As MP correctly stated, it is standard industry practice for trackage rights tenants to use their own crews. Indeed, MP and MKT prior to entering into this trackage rights agreement had several outstanding trackage rights agreements in force, and under each arrangement the tenant was authorized to conduct operations with its own crews. J.App. at 89. Significantly, the unions introduced no evidence of any term of a collective bargaining agreement that provided employees of the owning railroad with the right to participate in crew selection by a trackage rights tenant.

and is self-executing (*i.e.*, if adequate findings are made under 49 U.S.C. § 11344 to establish that a transaction is consistent with the public interest, no further findings under section 11341(a) are required).[8] Any carrier employees adversely affected by the transaction would be entitled to benefits under the *Mendocino* conditions. App. at A50.

In December, 1983, BLE and UTU filed with the United States Court of Appeals for the District of Columbia Circuit petitions for review of the ICC's May 18, 1983 and October 25, 1983 orders. The unions claimed in the case below that, *inter alia*, the ICC had exceeded its authority by exempting MKT's decision to use its own crews in the trackage rights operation from the requirements of the Railway Labor Act.[9]

In a split decision, a panel of the District of Columbia Circuit Court of Appeals vacated the ICC's May 18, 1983 and October 25, 1983 decisions. The panel majority (Judges Wright and Mikva) found that the ICC did not show a necessity for waiving the Railway Labor Act in the ex-

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[8] The Commission adopted the following reasoning of the Eighth Circuit in *Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963):

> Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers .... [T]o hold otherwise would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law.

Id. at 431-32.

[9] The unions also argued that the Commission's action violated article I, section 2 of the *Mendocino* conditions imposed pursuant to 49 U.S.C. § 11347. That argument was unresolved. The dissent rejected it, and the panel majority found it unnecessary to reach it in light of the finding that the Commission failed to justify an exemption from the requirements of the Railway Labor Act. App. at A13.

ercise of its Interstate Commerce Act authority.[10] App. at A13. The majority held that "the Commission must supply some basis for a necessity determination before the exemption authority applies," and relied on a line of Supreme Court cases that supposedly hold that the "ICC may waive . . . laws only if these . . . laws pose an obstacle to the transaction." App. at A14.[11] The majority rejected the ICC's holding in the October 25, 1983 order that "the terms of Section 11341 immunizing an approved transaction from any other laws are self-executing," and stated that "to the extent that [*BLE v. CNW*][12] may be read to say that ICC need supply no *basis* for the necessity determination, we find the interpretation ill-conceived and reject it." App. at A16 n.6. The majority then remanded the case to the Commission with instructions that "the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." App. at A18.[13]

Judge MacKinnon filed a vigorous dissent to the majority opinion. He correctly noted that "the whole basis

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[10] The majority also rejected the arguments of respondents and intervenors that BLE and UTU's appeals were untimely because they were aggrieved by the October 20, 1982 decision of the ICC and failed to file their petitions for review within the statutorily prescribed 60-day period, as required by 28 U.S.C. § 2344 (1982). App. at A9-A12.

[11] *See Callaway v. Benton*, 336 U.S. 132 (1949); *Schwabacher v. United States*, 334 U.S. 182 (1948); *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948); and *Texas v. United States*, 292 U.S. 522 (1934).

[12] *Brotherhood of Locomotive Eng'rs. v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

[13] In its original decision of May 3, 1985, the majority simply vacated the Commission's order, leaving the parties to their rights under the Railway Labor Act. During the pendency of the petitions for rehearing and suggestions for rehearing *en banc*, the panel majority amended the decision *sua sponte* to remand to the Commission.

for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger." App. at A24. He observed that 49 U.S.C. § 11341(a) grants the ICC very broad exemption powers and cited *BLE v. CNW* to support his and the Commission's view that the terms of that paragraph are "self-executing." App. at A25-A26. Judge MacKinnon discussed all of the Supreme Court cases relied on by the majority to support its "obstacle" standard of exemption. His conclusion was:

> [N]ot only did the Supreme Court *not* adopt the rigorous 'obstacle' standard which the majority today requires, the Court envisioned that the legislative purpose was to grant the Commission *greater* authority than the majority suggests to override state laws where needed to approve transactions 'consistent with *the public interest*' and to ensure that they are 'just and reasonable.' *Schwabacher*, 334 U.S. at 194-195.

App. at A31.

Judge MacKinnon agreed with the majority that "the ICC cannot bootstrap any exemption to its approval of transactions without justification," but he correctly pointed out that "this is far from such a case, since the necessity for waiver is clear." App. at A32. He then stated:

> [T]he whole point of granting the trackage rights applications was to reduce the anti-competitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific (*Id.*). Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific operations, *Id.*, and to offset to some extent the

> monopolistic effects of that enormous consolidation. The majority opinion gives short shrift to these essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

App. at A32 (footnote omitted).

Both the ICC and MKT filed petitions for rehearing and suggestions for rehearing *en banc*. Following the majority's *sua sponte* amendment of its decision, those petitions were denied by the Court of Appeals in orders dated August 9, 1985.[14] On March 24, 1986, this Court granted the petitions of the ICC and MKT for writs of certiorari to the District of Columbia Circuit Court of Appeals.

V.

SUMMARY OF ARGUMENT

The ICC's decisions below are fully supportable and should be affirmed. The Court of Appeals decision setting aside the ICC's action is bottomed on a narrow and crabbed reading of the scope of the Commission's authority under 49 U.S.C. § 11341(a) (1982), a reading that is at odds with the plain meaning of the statute, the national purpose evidenced by nearly 70 years of legislative history and prior decisions of this Court.

As we demonstrate *infra*, 49 U.S.C. § 11341(a) ordains the scope of the ICC's authority as "exclusive" and elim-

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[14] Senior Circuit Judge MacKinnon voted to grant the petition for rehearing, and Circuit Judge Starr voted to grant the suggestion for rehearing *en banc*. App. at A53-A54.

inates all avil by further providing that once a transaction is approved, its participants are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to . . . carry out the transaction . . . ." Nothing may be found in the statute to suggest a special exception for the Railway Labor Act.

As we further demonstrate, the plenary and unqualified language of section 11341(a) is no accident. Continuously since the end of the First World War, the railroad industry has been in a greater or lesser state of economic disarray, characterized by parlous financial condition, increased competition from other transportation modes and declining traffic and employment. The legislative response has been to adopt a national policy favoring and fostering railroad consolidation, by encouragement or sometimes compulsion, and to achieve this national objective in part by overriding all other laws that might inhibit its attainment. In adopting the successive legislation implementing this goal—the Transportation Act of 1920 ("1920 Act"), the Emergency Railroad Transportation Act of 1933 ("ERTA"), and the Transportation Act of 1940 ("1940 Act")—the effects of accomplishing consolidations on the railroad work force have not been ignored. Yet Congress has always come down on the side of a conclusion that consolidations were in the long term interest of rail labor, that a complete exemption of approved transactions from all other laws was required, and that employee protection should be accomplished by developing a system of compensation for the adverse effects of consolidations, rather than providing labor with a vehicle for thwarting or even substantively modifying the transactions. All attempts to carve a permanent exception for the RLA from section 11341(a) (and its predecessors) have been unsuccessful, as have attempts to impose substantive limitations on approved transactions.

As we further demonstrate, there can be no doubt that the procedures of the RLA conflict with the implementation of this (or any) approved transaction. The essence

of the RLA is the preservation of the status quo for as long a period as possible, and the coincident prohibition of self-help or unilateral change until the procedures of the RLA have been exhausted. At that time, unions are free to strike over unmet demands. The essence of the implementation of a consolidation or other approved transaction is the prompt effecting of change to achieve the public interest objectives, in the absence of which the transaction could not have been approved. Under the Commission's standard employee protective conditions, compulsory arbitration is available to resolve disputes concerning implementation of approved transactions. Thus, the intentionally protracted RLA procedures, delaying change, and the preservation of employees' right to strike are intrinsically at odds with the policy favoring approved transactions.

The particular claim giving rise to the instant dispute is an especially acute reflection of this dichotomy. The UP-MP-WP consolidation could *not* have been approved as being consistent with the public interest unless, *inter alia*, MKT were given the trackage rights at issue to compete independently with the consolidated carrier. Yet the rail brotherhoods' essential claim is that MKT should be precluded from mounting an independent operation with its own employees and instead should be captive to RLA procedures that would allow the employees of MP—the carrier with which it is supposed to be aggressively competing—to strike and to shut down the trackage rights operation required by the public interest if MP fails to accede to their employees' demands to crew MKT trains performing the trackage rights operation.

We next demonstrate the error of the Court of Appeals conclusion that the ICC was required to make specific findings establishing that an exemption from the RLA was necessary. This Court has long since established that the findings the ICC must make are the public interest findings required to approve the transaction in the first in-

stance. Once those findings are made, the ICC's exemption authority is self-executing. Finally, we demonstrate that, whether required or not, the ICC did, in fact, make findings justifying the necessity of the exemption. The Court of Appeals majority, although it couched its decision in terms of an alleged absence of findings, in reality simply disagreed with the ICC's findings. As the dissent correctly observed: "In doing so, the panel has usurped the statutory authority of the ICC and has substituted its judgment for that of the ICC." App. at A34.

VI.

ARGUMENT

A. The ICC Has Plenary Authority To Exempt Carriers Participating In Transactions Approved Under 49 U.S.C. §§ 11343 And 11344 From Any And All Provisions Of The Railway Labor Act, As Necessary To Permit Implementation Of The Transactions

Section 11341(a) of the Interstate Commerce Act ("ICA") could scarcely be clearer. *See* 49 U.S.C. § 11341(a) (1982). It establishes that the Commission's authority to approve, condition, or disapprove the transactions specified in the balance of the subchapter—which include consolidations and mergers—is "exclusive." *Id.* It further "avoids any ambiguity" by providing, with but a single qualification or exception, that parties to approved transactions are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction." *Minneapolis & St. Louis Railway v. United States*, 361 U.S. 173, 190-91 n.12 (1959). The sole exception relates to State law requirements for majority (or other) shareholder voting on certain corporate transactions. 49 U.S.C. § 11341(a) (1982). There is no exception for *any* provision of Federal law, including the RLA. Although the Court of Appeals, in amending its original decision to provide for a remand to the Commis-

sion, has belatedly recognized that the exemption provision does apply to the Railway Labor Act, the practical effect of its action is to diminish section 11341(a) in a fashion that is inconsistent with the plain meaning of that provision, with its legislative history, and with prior decisions of this Court.

1. The legislative history of section 11341(a) comports with and reinforces the plain meaning of that provision as sweeping aside the provisions of the Railway Labor Act to the extent they would impede an approved transaction.

The plenary language of section 11341(a) is no accident. It has a history going back more than 60 years. A tracking of that history and the attempts to modify the Commission's exemption authority demonstrates that the Congress meant what it said. During this entire period, the legislative will has been to foster railroad consolidation, either by compulsion or by encouragement, and in either case, to override all other laws that might inhibit that national objective.

a. Transportation Act of 1920

Section 11341(a) had its origin in the Transportation Act of 1920. *See* Transportation Act of 1920, Pub.L.No. 66-152, ch. 91, § 407(8), 41 Stat. 456, 482 (1920) (codified as amended at 49 U.S.C. 11341(a) (1982)). The 1920 Act returned the railroads to private ownership after a period of government control necessitated by the emergency state created by World War I, and established for the first time a national transportation policy favoring railroad consolidations.[15]

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[15] The Senate Committee Report on S.3288, the Senate version of the bill, provided that "heretofore, the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint." S. Rep. No. 304, 66th Cong., 1st Sess. 18 (1919). As the Court stated in *Texas v. United*

The 1920 Act amended section 5 of the Interstate Commerce Act by adding section 407, paragraphs (2) and (4) (hereinafter referred to as "sections 5(2) and 5(4) of the 1920 Act"), which provided that the Commission could authorize consolidations "subject to such terms and conditions as it shall find to be just and reasonable," if the proposed transaction was in harmony with and in furtherance of a national plan for consolidation of railway properties established by the ICC, and would promote the public interest. *See* Transportation Act of 1920, Pub.L.No. 66-152, ch. 91, § 407(2), (4), 41 Stat. 456, 481 (1920). The 1920 Act provided in section 407, paragraph (8) (hereinafter referred to as "section 5(8) of the 1920 Act") that carriers affected by orders of the ICC approving consolidations and leases:

> shall be and they are hereby, relieved from the operation of the 'antitrust laws,' as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Id. § 407(8), 41 Stat. at 482.

The legislative history surrounding section 5(8) focused on the exemption of consolidations from the antitrust laws. During the House debate on its version of the bill (H.R.

States, 292 U.S. 522 (1934), "the Transportation Act of 1920 introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. . . . The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts and acquisition of control was given in aid of that policy." *Id.* at 530.

10453), Congressman Sims moved to strike the entire exemption section because, in his view, it repealed part of the Sherman antitrust law. 58 Cong. Rec. 8593 (1919). Congressman Hudspeth offered a substitute amendment designed to preserve the States' authority to regulate carriers, "provided that nothing in this Act shall relieve or exempt any carrier or express company from obedience to the constitution and antitrust laws of the state of its creation, or in which it may operate." 58 Cong. Rec. 8595 (1919). The Hudspeth amendment and Congressman Sims' motion to strike the entire exemption section were rejected. 58 Cong. Rec. 8602 (1919). The breadth of the exemption was addressed in the Conference Report. It provided that "an order of the Commission approving a specified consolidation may be carried out notwithstanding any State or Federal restraining or prohibitory law to the contrary." H.R. Rep. No. 650, 66th Cong., 2d Sess. 64 (1920).[16]

b. Emergency Railroad Transportation Act of 1933

By 1933, as a result of the Depression, many railroads were suffering financially and were struggling to remain in business. Many were bankrupt, while others had borrowed large sums of money from the Reconstruction Finance Corporation to fund continuing operations. S. Rep. No. 87, 73rd Cong., 1st Sess. 1 (1933). To meet these interest charges, many railroads deferred maintenance. H.R. Rep. No. 193, 73rd Cong., 1st Sess. 9 (1933). Railroad employment dropped from 1,750,000 to 1,000,000. *Id.* In an effort to resolve the crisis, Congress enacted the Emer-

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[16] The 1920 Act also created a Labor Board to decide railroad labor disputes involving grievances, work rules, and working conditions. *See* Transportation Act of 1920, Pub.L. No. 66-152, ch. 91, tit. III, 41 Stat. 456, 469 (1920). It provided further that all carriers and their employees had the duty "to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier" because of labor disputes. *Id.* § 301. 41 Stat. 469. *United States v. Lowden*, 308 U.S. 225, 236 (1939).

gency Railroad Transportation Act of 1933, Pub.L.No. 68, ch. 91, 48 Stat. 211 (1933) (title I expired June 17. 1936; title II amended 1940).

Title I of ERTA was temporary legislation—of ultimately three years duration[17]—that was intended to help the railroads become financially stable. Intense competition among the railroads had resulted in unnecessary expenses. *The Emergency Transportation Act of 1933: Hearings on S.1580 Before the Senate Comm. On Interstate Commerce*, 73rd Cong., 1st Sess. 11 (1933). Accordingly, Congress established a federal railroad coordinator to encourage carriers to eliminate unnecessary expenses and duplication of services, and to take other measures designed to prevent "undue impairment of net earnings." The Emergency Railroad Transportation Act of 1933, Pub.L.No. 68, Title I, § 4, 48 Stat. 211, 212 (1933); S. Rep. No. 87, 73rd Cong., 1st Sess. 1 (1933). The coordinator did not have authority to compel consolidations. *See* 77 Cong. Rec. 4858 (1933). *See also St. Joe Paper Co. v. Atlantic Coast Line Railroad*, 347 U.S. 298, 317 (1954).

In hearings on the bill, labor representatives expressed concern that the coordinator's efforts to cut costs might result in fewer jobs and unfavorable working conditions for employees. *The Emergency Railroad Transportation Act of 1933: Hearings on H.R. 5500 Before the House Comm. on Interstate and Foreign Commerce*, 73rd Cong., 1st Sess. 25, 50 (1933). In response to those concerns, the Senate Interstate Commerce Committee agreed that "the economies to be secured [under Title I] should not result in additional dismissals of large numbers of railroad employees." S. Rep. No. 87, 73rd Cong. 1st Sess. 1 (1933). The Committee therefore included in section 7 of Title I a provision that employees could not be dismissed as a result

[17] Originally enacted for one year, Title I was extended for an additional year by Presidential proclamation, Proclamation No. 2082 (May 2, 1934), and then for a third year, until June 17, 1936, by Congress, S.J. Res. 112, 74th Cong., 1st Sess., 79 Cong. Rec. 9346 (1935).

of the coordinator's orders. The Emergency Transportation Act of 1933, Pub.L.No. 68, tit. I, § 7(b), 48 Stat. 211, 214 (1933).

Labor representatives also were concerned that the economic measures taken by carriers in response to the coordinator's orders might result in reduced wages. As a result of this concern, in enacting section 10(a) of ERTA (an exemption provision similar to section 5(8) of the 1920 Act), Congress provided that "nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." *Id.* § 10(a), 48 Stat. at 215.

Thus, in the extraordinary and temporary provisions of ERTA's Title I, Congress expressly narrowed the plenary exemption authority of section 5(8) of the 1920 Act by carving out an exception for the Railway Labor Act, an evident recognition of the fact that no such exception was implicit in section 5(8). At the same time, however, Congress enacted Title II, section 202 of ERTA as permanent legislation, amending the consolidation provisions of the 1920 Act so as, *inter alia*, to give the ICC jurisdiction over holding companies. The Emergency Railroad Transportation Act of 1933, Pub.L.No. 68, tit. II, § 202, 48 Stat. 211, 217 (1933). In doing so, Congress reenacted in section 202, paragraph (15) (hereinafter referred to as "section 5(15) of ERTA"), without substantive change, and without a Railway Labor Act exception the broad exemption provision that formerly had been designated as section 5(8) of the 1920 Act. *Id.* at § 202(15), 48 Stat. at 219. Thus, the predecessor of section 11341(a) continued intact and unlimited.

c. Transportation Act of 1940

The railroads continued to experience financial difficulties after the enactment of ERTA. By 1937, the number

of bankrupt railroads was at its highest point, and consolidation activity pursuant to the government's national plan was at a new low. *See* Leonard, *Railroad Consolidation Under the Transportation Act of 1920* 235 (1946). *See also* 1938 *I.C.C. Ann. Rep.* 2-3.

Consequently, in 1938 President Roosevelt appointed three ICC Commissioners to prepare a comprehensive analysis of the rail industry's problems. This "Committee of Three" recommended establishing a Transportation Authority (similar to the federal coordinator under the ERTA) to plan and to encourage railroad consolidations, coordinations, and unifications to eliminate waste, and recommended giving the Commission authority to require unifications if sought by at least one carrier. *Immediate Relief for Railroads, Message From the President of the United States Transmitting His Recommendations for Means of Immediate Relief for Railroads*, H.R. Doc. No. 583, 75th Cong., 3d Sess. 20 (1938). *See also St. Joe Paper Co.*, 347 U.S. at 318. A bill was introduced in the House (H.R. 2531) to implement the recommendations of the Committee of Three. Section 209 of Title II of the bill had language that was identical to paragraph 10(a) of Title I of ERTA, authorizing exemptions from the antitrust and all other laws, except laws for the protection of the public health or safety and the Railway Labor Act. H.R. 2531, 76th Cong., 1st Sess., tit. II, § 209, *reprinted in Omnibus Transportation Bill: Hearings on H.R. 2531, Before the Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. 9 (1939). This bill, however, died in the House.

A substitute bill, H.R. 4862, was drafted adopting the recommendations of the Committee of Six, a committee consisting of three railroad executives and three representatives of railway labor. That Committee recommended legislation:

> repealing those portions of the Interstate Commerce Act which made the regulatory body re-

> sponsible for the prescription of a general plan of consolidation for railroads, and substituting therefore provisions which will restore to the carriers all initiative in the matter, with requirement of the approval of the Transportation Board, before any proposed consolidation may lawfully be made effective, such approvals to be granted or withheld in accordance with the consolidations hereinbefore suggested, and when granted to carry with it relief from all restraints or prohibitions imposed by State or Federal Law.

Report, Committee Appointed Sept. 20, 1938 to Submit Recommendations Upon the General Transportation Situation, Dec. 23, 1938, reprinted in Omnibus Transportation Bill: Hearings on H.R. 2531 Before the Comm. on Interstate and Foreign Commerce, 76th Cong., 1st Sess. 276 (1939).

Congress, in passing section 7 of the Transportation Act of 1940, enacted a sweeping revision of section 5 of the Interstate Commerce Act in order "to facilitate merger and consolidation in the national transportation system." *County of Marin v. United States*, 356 U.S. 412, 416 (1958). As this Court stated in *Schwabacher v. United States*, 334 U.S. 182 (1948), "[the 1940 Act] authorized approval by the Commission of carrier initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness." *Id.* at 193. The revised language of section 5 "expresse[d] clearly the desire of Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification."[18] *County of Marin*, 356 U.S. at

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[18] For example, paragraph (2)(a) of the Act authorized the consolidation or merger of two or more carriers, the purchase or lease of property or acquisition of control of one carrier by another, and the acquisition of control of a carrier by a non-carrier. The Transportation

417-18. The Act strengthened the previous exemption provisions by providing in section 7, paragraph (11) (hereinafter referred to as "section 5(11) of the 1940 Act") that the Commission's jurisdiction over transactions such as mergers was "exclusive and plenary."[19] As this Court stated in *Seaboard Air Line Railroad v. Daniel*, 333 U.S.

Act of 1940, Pub.L.No. 785, ch. 722, § 7(2)(a), 54 Stat. 899, 905 (1940); see *County of Marin*, 356 U.S. at 418.

[19] Section 5(11) of the Transportation Act of 1940 provided:

> "(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in a[ny] resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

The Transportation Act of 1940, Pub.L.No. 785, ch. 722, § 7(11), 54 Stat. 899, 908 (1940).

118 (1948), this amendment to section 5(11) constituted "additional proof" of Congress' intent to grant adequate power to the Commission to override laws that might interfere with efficient and economical railroad operation. *Id.* at 125.

Section 7, paragraph (2)(f) of the Transportation Act of 1940 (hereinafter referred to as "section 5(2)(f) of the 1940 Act") also provided protection for railroad employees adversely affected by "transactions," mergers, consolidations, acquisitions of control, leases, and acquisitions of trackage rights.[20] Prior to the enactment of the 1940 Act, there was no statutory provision specifically requiring the protection of employees affected by consolidations of railroad facilities.[21]

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[20] Section 5(2)(f) provides as follows:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The Transportation Act of 1940, Pub.L.No. 785, ch. 722, § 7(2)(f), 54 Stat. 899, 906-07 (1940).

[21] As the Court stated in *Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142 (1950):

During the debate in Congress on section 5(2)(f) and labor protection issues arising out of consolidations, Representative Harrington offered the following amendment to section 5(2)(f):

> *Provided* however that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.

84 Cong. Rec. 9882 (1939). The Harrington Amendment was contained in the House substitute bill that went to conference on July 27, 1939. The Interstate Commerce Commission, however, in a January 29, 1940 letter to the Chairman of the Senate and House Committees on Interstate Commerce, strenuously objected to the Harrington Amendment, stating:

> As for the [Harrington Amendment], the object of unifications is to save expense, usually by saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington Agreement' of 1936 be-

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The precursor of [Section 5(2)(f)] was § 5(4)(b), as amended by the Emergency Railroad Transportaion Act of 1933. That section authorized the Commission to approve consolidations 'upon the terms and conditions . . . found to be just and reasonable.' There was, however, a widespread awareness in the railroad industry that many of the economies to be gained from consolidations or abandonments could be realized only at the expense of displaced railroad labor. The interests of such employees were recognized in the Washington Job Protective Agreement of 1936. This was a collective bargaining contract approved by about 85% of the railroad carriers and 20 of the 21 railroad brotherhoods. It contained a schedule of substantial financial benefits recommended for employees adversely affected by consolidations or so-called 'coordinations.' *Id.* at 147 (footnotes omitted).

> tween the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable.

Interstate Commerce Commission, 76th Cong., 1st Sess., Report on S.2009, Omnibus Transportation Legislation 67 (House Comm. Print 1940).

After a lengthy conference, on April 26, 1940, the conferees agreed on a bill that followed the form of the House Amendment but did not contain the Harrington Amendment. *See* H.R. Rep. No. 2016, 76th Cong., 3d Sess. 16 (1940); 86 Cong. Rec. 5879-80 (1940). The House voted to recommit the bill with instructions to its conferees to insist on the Harrington Amendment. 86 Cong. Rec. 5886 (1940). After further consideration, the conferees then reported out the bill a second time with a substitute for the Harrington Amendment. The bill became the Transportation Act of 1940.[22]

As this Court stated in *Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142 (1950):

> The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that em-

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[22] The bill was passed by the House on August 12, 1940, 86 Cong. Rec. 10194 (1940), and by the Senate on September 9, 1940, 86 Cong. Rec. 11766 (1940). It was signed by the President on September 19, 1940, 86 Cong. Rec. 12290 (1940).

> ployees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.

Id. at 151.

The defeat of the Harrington Amendment confirmed Congress' intent to allow carriers to implement consolidations irrespective of the fact that the Commission's approval might result in the alteration of working conditions and work rules for certain employees, as long as these employees were compensated fairly under the Commission's labor protective conditions. As this Court has held, section 5(2)(f) does not freeze jobs; it merely provides compensatory conditions for employees adversely affected by approved transactions. *Norfolk & Western Railway v. Nemitz*, 404 U.S. 37, 42 (1971); *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169, 176 (1961).[23]

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[23] The labor protective conditions themselves have undergone other changes since the Transportation Act of 1940 was enacted. Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") amended section 5(2)(f) to require that the "fair and equitable arrangement to protect the interests of the railroad employees affected" by an ICC-authorized transaction "contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to [section 5(2)(f)] and those established pursuant to section 565 of Title 45 [Section 405 of the Rail Passenger Service Act]." The Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L.No. 94-210, § 402(a), 90 Stat. 31, 62 (1976). The changes in the Commission's standard protective conditions necessitated by the 4R Act are described in *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). However, as the Commission noted in this proceeding:

> [T]he 4R Act did not limit our authority to exempt a transaction from the RLA. Rather, the 4R Act specified standards for the minimum level of employee protection to be imposed as conditions to the approval of certain transactions. Those standards, however, do not require preserving rights under the RLA. Affected carrier employees have rights imposed pursuant to 49 U.S.C. 11347.

App. at A43.

Thus, section 11341(a)—and its predecessors, section 5(11) of the 1940 Act, section 5(15) of ERTA, and section 5(8) of the 1920 Act—have had an immutable meaning.[24] Although the forms and circumstances of the transactions subject to ICC jurisdiction have changed, one principle has remained constant: parties to approved transactions should be free of the constraints of all other law, including the Railway Labor Act, that would forestall implementation of the transactions.

2. The Court of Appeals ignored the language and legislative history of section 11341 and misinterpreted this Court's decisions in refusing to uphold the ICC's grant of exemption from the Railway Labor Act.

The Court of Appeals was oblivious to the inevitability of RLA procedures forestalling implementation of the transaction. Under section 6 of the Railway Labor Act, a party proposing to change "rates of pay, rules, or working conditions" must give notice to the other side and then negotiate over the proposed changes. 45 U.S.C. § 156 (1982). If an agreement is not reached, negotiation continues under the auspices of a mediator appointed by the National Mediation Board unless and until the Board determines that an unresolvable impasse has been reached. *Id.* § 155. At that point, the Board attempts to induce the parties to submit the dispute to voluntary arbitration under 45 U.S.C. § 157. *Id.* § 155. If either party refuses arbi-

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[24] Section 5(11) was unchanged (except for recodification as section 11341(a)) from 1940 until 1982, with enactment of the Bus Regulatory Reform Act. *See* Bus Regulatory Reform Act of 1982, Pub.L.No. 97-261, § 21(a)(1), 96 Stat. 1102, 1122 (1982), extending the section to exempted as well as approved transactions under subchapter 113. Significantly, the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), which effected one of the most comprehensive overhauls of the Interstate Commerce Act since its original enactment in 1887, did not amend section 5(11) in any respect. *See* The Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L.No. 94-210, § 403(a), 90 Stat. 31, 63 (1976).

tration, the Board withdraws from the dispute and releases its jurisdiction.

Both carriers and unions are obligated to exhaust the section 6 procedures and to maintain the status quo, with respect to the proposed changes, throughout this entire period, and either party may seek and obtain injunctive relief against actions by the other that are in violation of the status quo requirement. *See Detroit & Toledo Shore Line Railroad v. UTU*, 396 U.S. 142, 155 (1969). Thereafter,[25] both parties are free to resort to self help: the union may lawfully strike and the carriers may unilaterally institute the proposed changes in rates of pay, rules, and working conditions. *See Railway Clerks v. Florida East Coast Railway*, 384 U.S. 238 (1966); *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad*, 372 U.S. 248, 291 (1963).

The Court of Appeals misapplied the plain language of section 11341. Rather than focusing on whether the RLA *procedures* could frustrate implementation of the approved transaction, the Court of Appeals concentrated on whether the selection of the *crews* could frustrate implementation of the transaction. App. at A16-A17. It then erroneously found that the crewing issue was not a material element of the transaction. The latter finding was incorrect, see *infra* pp. 39-40, but more importantly, the question whether MKT's trackage rights operation could be conducted successfully with MP crews is wholly beside the point. The critical fact is that MKT's entire trackage rights transaction could be frustrated if MP crews were given the right to *bargain* with MP over MKT's crewing, because

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[25] In cases where the dispute threatens substantially to interfere with interstate commerce, at the end of a 30-day cooling-off period a Presidential Emergency Board may be appointed to make a report recommending a solution of the dispute. 45 U.S.C. § 160 (1982). The status quo requirement in such a case continues until 30 days after the Emergency Board has submitted its report. *Id.*

MP employees could strike the MP and shut down MKT's trackage rights operation if they did not agree with MP's proposal for crewing. This is hardly a remote possibility in light of the fact that a threatened strike over this issue already has taken place, and in light of MP's employees' self-interest in impeding a competitive operation.

As the Eighth Circuit held in *Missouri Pacific Railroad v. UTU* when it upheld an injunction that had been issued against UTU to prohibit a threatened strike over the failure of MP to bargain with it concerning crewing the MKT trackage rights operation:

> [A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

782 F.2d at 112.

In refusing to uphold the ICC's exemption, the Court of Appeals concluded that the Commission could waive only laws creating obstacles to transactions approved by it. It relied on three decisions of this Court that assertedly supported its view. *See* App. at A14; *see also Callaway v. Benton*, 336 U.S. 132 (1949); *Seaboard Air Line Railroad v. Daniel*, 333 U.S. 118 (1948); *Texas v. United States*, 292 U.S. 522 (1934).

Judge MacKinnon ably highlighted the majority's erroneous reasoning. He noted that *Callaway* arose under Section 77 of the Bankruptcy Act (formerly 11 U.S.C. § 205) rather than under the merger provisions of the Interstate Commerce Act, and "[i]n its only comment relevant to this case," the *Callaway* Court indicated merely that nothing in its opinion should be read to derogate its prior opinions upholding the ICC's power "to *override* state laws inter-

posing obstacles in the path of otherwise lawful plans of reorganization." App. at A28; *see Callaway*, 336 U.S. at 140-41. Similarly, *Seaboard* failed to support the majority's opinion. The Court in that case acknowledged the ICC's power to override laws that *may* interfere with approved transactions. *See* App. at A28-A29; *see also Seaboard*, 333 U.S. at 125-26. That language alone vitiates the "obstacle" standard created by the majority in the case below.

Finally, *Texas v. United States* is also misinterpreted by the majority. As Judge MacKinnon correctly observed, the Court in that case emphasized that one purpose of the immunity provision was to promote economy and efficiency by removing burdens created by state laws. App. at A30; *see also Texas v. United States*, 292 U.S. at 534-35. This reasoning is far removed from the majority's holding that a statute *must* create an obstacle to a transaction before an exemption may be granted.

By holding that the ICC may exempt carriers only from laws that pose obstacles to a successful implementation of approved transactions, and by failing to find that RLA procedures could frustrate implementation of the transaction, the Court of Appeals has ignored the clear meaning of the language of 49 U.S.C. § 11341 and has rendered a decision that is inconsistent with numerous decisions of this Court.

B. The Commission Is Not Required To Make Specific Findings Under Section 11341 In Order To Exempt Carriers From Laws That Could Frustrate The Implementation Of Transactions Under Sections 11343 And 11344

The ICC long has maintained:

> The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints.

App. at A44. *See, e.g., Railway Express Agency, Inc., Notes*, 348 I.C.C. 157, 215 (1975); *Ex Parte No. 260, Revised Regulations Governing Officers*, 336 I.C.C. 679, 681-82 (1970); *Texas Turnpike Authority—Abandonment—St. Louis Southwest Railway Co. of Texas*, 328 I.C.C. 42, 46 (1965). In the case at bar, the Court of Appeals rejected this interpretation of section 11341. It found:

> I.C.C. has given no justification for a view that waiver of the Railway Labor Act is necessary to effectuate the transactions at issue. Indeed, the evidence in the record strongly suggests the contrary conclusion. The Commission therefore exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection.

App. at A17. This finding is directly at odds with decisions of this Court.

The seminal case exploring the interrelationship of the exemption provisions of section 5(11) and the merger approval provisions of section 5(2) of the Interstate Commerce Act is *Schwabacher v. United States*, 334 U.S. 182 (1948). In that case, the Court held:

> [A]pproval of a voluntary railroad merger is dependent upon three, and upon *only* three, considerations: First, a finding that 'it will be consistent with the public interest' (§ 5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is 'just and reasonable' (§ 5(2)(b).) Third, assent of a 'majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote' (§ 5(11).)

Id. at 194 (emphasis added).

The Court then stated:

> When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions. . . .'

Id. at 194-95. Thus, *Schwabacher* stands for the proposition that if the Commission makes the findings required by 49 U.S.C. § 11344, as it undeniably did in this case, the exemption provisions of section 11341(a) *automatically* apply to enable the carriers to effect the transaction.

Prior to *Schwabacher*, the Court examined the Commission's power to exempt carriers participating in approved merger transactions from the requirements of the antitrust laws. In *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), the Court ruled that the policies of the antitrust laws must be reconciled with the policies of the Interstate Commerce Act in the Commission's *public interest* analysis under section 5. *Id.* at 87. Similarly, in *Minneapolis & St. Louis Railway v. United States*, 361 U.S. 173 (1959), the Court stated:

> [A]lthough § 5(11) does not authorize the Commission to 'ignore' the antitrust laws, *McLean Trucking Co. v. United States*, 321 U.S. 67, 80, . . ., there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws.' The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope *and* appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public

> interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy.' 321 U.S. at 87.

Id. at 186.

All of the decisions of this Court have held that an analysis of the conflicting statutes is required in determining whether the transaction is in the public interest. Congress, by enacting section 11344(b)(1)(D), requires the Commission to consider the interests of employees in that public interest analysis. In the instant case, the ICC considered at length the impact these transactions would have on employees in making its public interest findings in its original decision, 366 I.C.C. at 618-22, and this aspect of its decision was upheld by the Court of Appeals, *Southern Pacific Transportation Co. v. I.C.C.*, 736 F.2d 708, 725 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S.Ct. 1172 (1985). Under these circumstances, the Commission was not required to make specific findings of necessity under section 11341, and the Court of Appeals erred when it required such findings in this case.

C. Assuming *Arguendo* That Specific Findings Of Necessity Are Required Under Section 11341 Before Exemption Authority Can Be Exercised, Findings In The Case At Bar Were Sufficient To Justify An Exemption From The Railway Labor Act

In *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), the Court held that an administrative agency must "disclose the basis of its order" and give clear indication that it has exercised the discretion with which Congress had empowered it. *Id.* at 167-168. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Id.* at 168. In this case, the ICC made sufficient findings to support its decision to exempt MKT and MP from the requirements of the Railway Labor Act.

We need only repeat Judge MacKinnon's assessment of the Commission's findings:

> The ICC specifically found that the trackage rights were needed to offset the anticompetitive harms created by the consolidation. 366 I.C.C. 459, 566-579. This court has affirmed this aspect of the ICC's decision. *Southern Pacific Transportation v. ICC*, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1172, 84 L.Ed.2d 322 (1985). But the ICC did not approve the trackage rights in the abstract; rather, it approved, pursuant to this 'necessity' finding, the trackage rights as applied for by the Katy and the Rio Grande.
>
> The ICC cannot bootstrap any exemption to its approval of transactions without justification. But this is far from such a case, since the necessity for the waiver is clear. The whole point of granting the trackage rights applications was to reduce the anticompetitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific (*Id.*). Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific operations, *Id.*, and to offset to some extent the monopolistic effects of that enormous consolidation. The majority opinion gives short shrift to the essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It

> is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

App. at A32 (footnote omitted). Furthermore, the Commission incorporated by reference the discussion of the Court of Appeals in *Brotherhood of Locomotive Engineers v. Chicago & North Western Railway*, 314 F.2d 424, 430-31 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), to bolster its conclusion that an exemption from the RLA was warranted. App. at A44. The Commission's reasoning may "reasonably be discerned," and should be upheld by the Court. *See Bowman Transportation, Inc. v. Arkansas Freight System, Inc.*, 419 U.S. 281, 285-86 (1974).

VII.

CONCLUSION

Missouri-Kansas-Texas Railroad Company respectfully

requests the Court to reverse the Court of Appeals' decision.

Respectfully submitted,

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